

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

To: Marlene H. Dortch  
Office of the Secretary

**COMMENTS OF AMERICA'S RURAL CONSORTIUM**

**Alaska Power & Telephone, Anchorage, AK  
Cimarron Telephone Company, Inc., Mannford, OK  
Columbus Telephone Company, Columbus, KS  
Cross Telephone Company, Warner, OK  
ETEX Telephone Cooperative, Gilmer, TX  
Holway Telephone Company, Maitland, MO  
KLM Telephone Company, Rich Hill, MO  
Moultrie Independent Telephone Company, Lovington, IL  
Pottawatomie Telephone Company, Earlsboro, OK  
South Central Rural Telephone Cooperative Corp., Glasgow, KY  
Star Telephone Company, Inc., Maringouin, LA  
State Long Distance Telephone, Elkhorn, WI**

**I. Introduction**

America's Rural Consortium (ARC), by its attorneys, respectfully submits its Comments in the above-captioned proceeding pursuant to the Federal Communications Commission's (FCC or Commission) Notice of Proposed Rule Making (NPRM) released herein on March 10, 2004 (FCC 04-28). ARC generally limits its Comments to those questions and issues raised in the NPRM relevant to incumbent local exchange carriers (ILECs) and more specifically rural ILECs.

ARC is comprised of community-based, service-oriented, progressive, rural independent telecommunications companies subject to the Communications Act of 1934, as amended by the

Telecommunications Act of 1996 (96 Act).<sup>1</sup> ARC urges the Commission to “break with the past” by freeing the rural telephone industry from monopoly-era regulation; to preempt inconsistent state regulations; and to regulate voice services under a unitary framework, if at all.

Historically, each ARC member operated simply as a “rural telephone company,”<sup>2</sup> but over the years, their businesses have evolved to offer a variety of wireline, wireless, Internet, and video services on a local and/or regional basis. ARC members agree that the paramount importance of this broad proceeding on Internet Protocol (IP) telephony merits presentation to the Commission of their individual and collective positions—as additional voices for the public interest—in conjunction with the industry associations that generally represent their interests before the FCC.

## **II. IP-Enabled Services Are Revolutionizing the Telecommunications Industry**

ARC believes the advent of IP-enabled services is a watershed event in the evolution and convergence of telecommunications and information-age services: “TeleInfoServices.” A major paradigm shift is at hand equal (or greater) in magnitude to the shift from telegraphy to telephony or from analog wireless to digital PCS. IP-based technologies are proving to be “the great equalizer” among transport and service platforms; they provide the foundation for true service convergence. IP technology is enabling ILEC competitors, *i.e.*, competitors to ARC members, to provide voice telephone services that are virtually indistinguishable from ILEC voice services over an increasing variety of platforms—cable TV lines, electric power lines and wireless or other delivery channels (including an ILEC’s own DSL facilities).

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<sup>1</sup> Communications Act of 1934, as amended, 47 U.S.C. § 150 *et seq.*, Public Law 104-104, 110 Stat. 56.

<sup>2</sup> 47 U.S.C. § 153(37).

Conversely, for ILECs, the “alchemy” of ever-improving DSL capabilities effectively permits their copper local loops to achieve digital performance levels approaching that of fiber optics—in terms of IP bandwidth and data through-put. Thus, IP enables rural ILECs to provide multiple services, such as voice, high-speed data, multi-channel video and more over their existing copper telephone lines. VoIP can also be provided as a stand-alone service over DSL. ARC submits that IP technology breathes new life into ILEC legacy plants by allowing ILECs to provide current and future services throughout the digital migration into the 21<sup>st</sup> Century. IP is an extremely potent agent-for-change in the telecommunications industry.

As a matter of fundamental fairness and in furtherance of the public interest, ARC members, as well as other rural ILECs, must be able to offer IP-enabled services under the same regulatory conditions as their competitors. For that reason, the Commission must rectify the current policies that saddle certain voice telephony competitors with monopoly-era regulation (ILECs) while allowing other competitors (the rest of the telecommunications industry) to operate under a much less burdensome regulatory framework.

### **III. Regulatory Parity is Essential for IP-Enabled Services**

Regulating IP-enabled services with a “light-hand” (or possibly not regulating it at all) has been a major theme of individual FCC Commissioners and the Chairman in their public speeches<sup>3</sup> and in their separate statements released with the NPRM herein.<sup>4</sup>

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<sup>3</sup> See, e.g., Commissioner Kathleen Q. Abernathy, Address at the Quello Center, Telecommunication Management and Law, Michigan State University (Feb. 19, 2004), “[W]e should employ a light touch [to VoIP services].” See, e.g., Commissioner Kevin J. Martin, Statement at the FCC’s VoIP Forum (Dec. 1, 2003). See, e.g., Chairman Michael K. Powell, Address at the Meeting of the Technology Advisory Council (Oct. 20, 2003). See, e.g., Chairman Michael K. Powell, Statement Before the Committee on Commerce, Science, and Transportation United States Senate (Feb. 24, 2004), “[W]e have begun laying the foundation for a “light touch” regulatory environment for Internet voice services.”

As a basic objective, the Commission states in its NPRM:

Our aim in this proceeding is to facilitate this transition, relying wherever possible on competition and applying discrete regulatory requirements only where such requirements are necessary to fulfill important policy objectives.<sup>5</sup>

ARC interprets this statement to mean that IP-enabled services will generally be offered in an environment of non-discriminatory competition. While subject to certain social, security and/or safety requirements, they will not be subject to the heavy hand of traditional entry and/or economic regulation.<sup>6</sup> Historically, because they evolved as franchise-monopolies, ARC members' wireline services have been heavily regulated at both the state and federal levels. At the other end of the regulatory spectrum, providers of new services in the late 20<sup>th</sup> and early 21<sup>st</sup> Centuries who compete or will soon directly compete with ARC members—CMRS, Wi-Fi, satellite, cable telephony, and broadband-over-power lines (BPL)—enjoy operating under little to no comparable state or federal regulation.

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<sup>4</sup> See, e.g., *In re In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, at Statement of Chairman Michael K. Powell, "[O]ur best hope for continuing the investment, innovation, choice and competition that characterizes Internet services today lies in limiting to a minimum the labyrinth of regulations and fees that apply to the Internet." See, e.g., *In re In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, at Statement of Commissioner Kathleen Q. Abernathy, "I am deeply skeptical about the application of economic regulation to these nascent services...[W]e need to take this opportunity to step back and ascertain whether those [legacy regulatory] rules still make sense for any providers, including incumbents...[N]otwithstanding my interest in maintaining a light touch, I am committed to ensuring that our regulatory approach meets certain critical social policy objectives."

<sup>5</sup> *In re In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, para. 5 (2004).

<sup>6</sup> The Commission's forbearance powers under Title II of the Communications Act of 1934 and its ancillary jurisdiction powers under Title I specifically authorize the Commission to apply at its discretion certain basic public interest obligations while forbearing IP service providers from the burdensome legacy regulations of Title II.

ILECs of all sizes remain subject to detailed, complex, and archaic monopoly-era state and federal regulation. If the Commission, in this or other proceedings, does not order regulatory parity among telephony providers, it will leave all ILECs severely handicapped vis-à-vis their competitors, which are subject to “light-handed” regulation. The monetary costs associated with the existing state and federal regulations alone are leaving rural ILECs especially disadvantaged, especially in raising the capital needed to compete with other competitive platforms. In addition, the costs, burdens, and obligations of participating in legislative, regulatory, and legal proceedings—and reporting and compliance obligations at the state and federal levels—have increased regularly and dramatically since passage of the 96 Act. These are abject costs to small, rural companies. The Commission should provide ARC members immediate relief from these burdensome costs.

#### **IV. The Commission Should Order a Unitary Regulatory Framework for Voice Telephony and Other IP-Enabled Services**

As many parties have said in IP-related proceedings and in recent Congressional testimony, burdensome regulations thwart the advancement of technology and the innovative uses of new technologies. Moreover, these burdensome regulatory costs are more than monetary; they encompass lost time, opportunity costs, and a waste of human capital. Therefore, ARC believes the Commission must preempt state economic regulation for all wireline and IP-enabled voice services, similar to the treatment of commercial wireless carriers. This would cure the current regulatory inequity between wireline and wireless services since wireless carriers are not currently subject to numerous regulatory frameworks among more than 52 legal jurisdictions. The historical burdens placed on wireline services are a serious and growing impairment that stifles growth for independent ILECs. This is especially true for rural service providers for

which profit margins are thin and existing regulatory structures place them at a competitive disadvantage.

The sentiment for the foregoing is obvious given the apparent failings of the much litigated 96 Act and the need for Congress to fundamentally review the 96 Act to see whether it still makes sense, promotes the public interest, or, as an unintended consequence, causes harm<sup>7</sup> to rural ILECs and others. ARC therefore urges the Commission to adopt policies that will level the playing field for rural ILECs and will forebear rural ILECs from continuing to operate under the current lingering legacy regulatory scheme which stifles economic growth in rural areas. The public interest requires “functionally equivalent”<sup>8</sup> services to be similarly treated under a transparent, non-discriminatory regulatory framework solely at the federal level.

Accordingly, ARC vigorously advocates that the Commission “break with the past” by freeing the incumbent telephone industry from monopoly-era regulation at a time when it is currently facing direct, dynamic competition from commercial wireless providers, cable MSOs, and “virtual carriers” utilizing IP-enabled services, while preparing for imminent competition from community-based electric utilities offering BPL. In addition, ILEC minutes of use and access revenues are declining by virtue of indirect competition from e-mail, Instant Messaging

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<sup>7</sup> Paraphrasing Hippocrates, *Epidemics*, Bk. I, Sect. xi: “[Regulator]...help, or at least ...do no harm.”

<sup>8</sup> The functional equivalency test “looks to whether there are any material functional differences between services. An important part of the test . . . involves reliance upon customer perception to help determine whether the services being compared provide the same or equivalent functions. The test asks whether the services at issues are “different in any material respect” and requires the Commission to examine both the nature of the services and the customer perception of the functional equivalency of the services.” *In the Matter of Cellexis International, Inc., Complainant, v. Bell Atlantic NYNEX Mobile Systems, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 22887, para. 11 (2001). See also, *Ad Hoc Telecomm. Users Comm. v. F.C.C.*, 680 F.2d 790, 794-797 (D.C. Cir. 1982).

and web-based services. Most certainly, rural ILECs—relative to their smaller size and lesser market power—are prime candidates for full deregulation. At a minimum, rural ILECs should enjoy the same “light-handed” regulation as providers of IP-enabled services and other competitive services.

## **V. ARC Members Exemplify Rural Telecommunications Service**

As rural ILECs, ARC members are unique. They truly serve the public interest because they install, operate, and maintain high-quality services in hard-to-serve areas with a low density of customers and population. Naturally—as has been recognized countless times by the Commission—rural ILECs’ costs are higher. Recovering these costs, while earning a fair return on investment, is both more fragile and volatile than for telecommunications providers that serve urban or suburban areas or that utilize lower-cost facilities (such as wireless companies) to deliver competing services. Even slight shifts in demand, costs, revenues, or other operating factors can cause dramatic changes in a rural ILEC’s bottom line. The fragility of their economics directly impacts their responsibilities as carriers-of-last-resort for their communities. As such, ARC members will surely be called upon to continue to serve customers who are not offered or who cannot utilize IP-enabled services.

ARC member incumbents, who have constructed, operated, maintained and upgraded the local networks that have served this nation well for many decades must not be disadvantaged to the sole benefit of new entrants by either anachronistic legislation or regulatory fiat. Notably, rural ILECs have upgraded their facilities to provide broadband access to the Internet and to IP-enabled services while facing direct competition in their services areas.<sup>9</sup> Some, in addition, do

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<sup>9</sup> “New Survey Shows OPASTCO Rural Telcos Make Advance Services Widely Available,” News Release, May 10, 2004, (99% of OPASTCO members surveyed provide advanced

not draw Universal Service Fund support for certain services and they have replaced that support with revenues from new services, such as offering multi-channel video over an IP-enabled services platform. Others offer flat-rate, all-distance calling plans over legacy plant, while others are moving toward offering flat-rate, all-distance VoIP services.<sup>10</sup>

As is evident above, ARC strongly urges the Commission to do nothing to burden or to undermine rural ILECs' efforts to continue to pursue rational, free enterprise or entrepreneurial business plans, which are premised on little to no regulation. To the contrary, the Commission's policies should ensure that advanced services offered by rural ILECs, as described herein, remain affordable and that they become ubiquitous in rural areas, thereby satisfying this country's long-standing policy of promoting universal service. Thus, ARC recognizes that there may need to be minimal regulation at the federal level, which must address such mechanisms as rural grants-in-aid, tax incentives, and forward-looking regulatory policies to promote universal broadband deployment.

Given the enormous economic implications of this rulemaking, the Commission must pay particular attention to the specific economic impacts its decision will have on rural ILECs, which tend to be smaller companies that play a large role in the economic development of their communities. Under the federal Regulatory Flexibility Act (RFA), the Commission is required to consider "alternatives...which...minimize any significant economic impact of the proposed

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services—at least 200 kilobits/second, both directions—to their customers; 77% of members face at least one competitor and 38% of members face at two or more competitors.).

<sup>10</sup> For rural LECs relying on legacy TDM plant, this plant will continue to be used to originate and/or terminate both traditional and innovative services such as IP-Enabled services, with new investment and possible economic restructuring or reorganization.



rule on small entities.”<sup>11</sup> Under its RFA analysis, the Commission must consider whether it should to completely exempt small businesses from coverage of a rule or rules.<sup>12</sup> If the Commission decides to generally sustain monopoly-era regulations for ILECs, ARC members respectfully request the Commission to closely scrutinize the impact of such a decision on rural ILECs and to strongly consider exempting rural LECs from those monopoly-era regulations.

## **VI. Fair Compensation for the Use of ILEC Facilities**

Rural ILECs must be fairly compensated for the use of their telephone plant, including switching facilities. If a provider of an IP-enabled service “rides” the PSTN in order to provide its service, it must provide just compensation for that ride to the appropriate ILECs. To hold otherwise would be an unconstitutional “taking” under the 5<sup>th</sup> Amendment to the United States Constitution.<sup>13</sup> It is with this understanding that ARC members strongly support the Commission’s stated policy that if voice traffic “rides on” the PSTN, then the providers of that traffic should pay the ILECs for that ride.<sup>14</sup> All such traffic should be charged the same by requiring the addition of all types of traffic transiting the TDM portion of the network to be added to the total minutes used to calculate the rate elements’ incremental costs.

In order for the Commission to achieve equity in ILEC cost recovery, the Commission must require that all traffic terminating on the PSTN include complete SS7 information in the call detail. Otherwise, ILECs, such as ARC members, will continue to be unable to properly

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<sup>11</sup> 5 U.S.C. § 603(c).

<sup>12</sup> 5 U.S.C. § 603 (c)(4).

<sup>13</sup> U.S. CONST. amend V.

<sup>14</sup> *In re In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, para. 33 (2004).

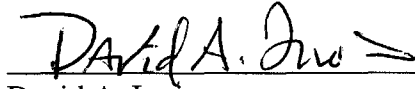
identify the originating carrier on a real-time basis. To require ILECs only to identify the originating carrier in a post-recording process is fundamentally unfair and is an inefficient use of ILEC resources. Further, if any traffic remains unbillable, ILECs will not have the resources to upgrade services and plant to the benefit of their customers.

ARC members realize that intercarrier compensation has been a very controversial issue for the Commission that encompasses more than simply what ILECs may charge IP-enabled service providers for use of the PSTN. Nonetheless, ARC believes that fairly compensating rural ILECs for the use of their networks is a bedrock principle that serves the public interest because it allows these ILECs to operate, maintain and upgrade their plant and switching facilities to the benefit of their customers and of their communities. Due to the current lack of industry consensus for intercarrier compensation issues on a global basis, the Commission must assume a leadership role in developing forward-looking policies that serve the public interest. ARC members stand ready to assist the Commission in this vital public policy effort.

## **VII. Conclusion**

The Commission must continue to recognize the unique position that rural ILECs play in the competitive landscape, especially in hard-to-serve areas with low density of customers and population. The Commission should establish state-preemptive national rules for IP-enabled service providers and related competitors, such as rural ILECs, that ensure a level playing field for all providers of voice, data, and video services. If voice traffic “rides on” PSTN facilities, then ILECs deserve to receive fair compensation for the use of their facilities.

Respectfully submitted,

A handwritten signature in black ink, reading "David A. Irwin" with a stylized flourish at the end.

David A. Irwin  
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<sup>15</sup> Admitted in Maryland, Not in the District of Columbia.